IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Ambalal vs. Ramesh Chandra & ors.

S.B. Civil Second Appeal No.12/1987 against the judgment and decree dated 4.8.1986 passed by the learned Additional District Judge, Rajsamand in Civil Appeal No.14/1983.

Date of Judgment: March 22, 2006.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

REPORTABLE

Mr. Rameshwar Chouhan,for the appellant
Mr. Rajendra Mehta & Mr. M.R.Mehta, for the respondents.

BY THE COURT:

This second appeal is against the judgment and decree passed by the trial court dated 17.3.1983 in Civil Original Suit No.56/1977 and against the appellate judgment and decree dated 4.8.1986 in Civil First Appeal No.14/1983.

Brief facts of the case are that defendant no.1-appellant purchased one plot, having no.1, situated near the Bus Stand of Nathdwara from the respondent-Municipal Board,Nathdwara for which a registered transfer deed was executed by the Municipal Board, Nathdwara in favour of defendant no.1-appellant on 5.1.1969. Said plot was sold by defendant no.1 to the plaintiff by registered sale-deed dated 9.12.1969 for a consideration of Rs.2500/-. Subsequent to it,

when the plaintiff submitted an application for obtaining copy of the map of the plot in dispute before the respondent-Municipal Board, Nathdwara, the plaintiff came to know that the Municipal Board, Nathdawara changed the scheme and allotted plot no.5 in new scheme in lieu of plot no.1. However, the said plot was allotted in the name of defendant no.1 and defendant no.1 gave his consent to Municipal Board, Nathdwara on 15.11.1973 to accept plot no.5 in lieu of plot no.1. According to the plaintiff, since plot no.1 was transferred to the plaintiff by registered sale-deed, defendant no.1 could not have obtained plot no.5 in his name from the Municipal Board, Nathdawara. The plaintiff, therefore, after serving notice upon the defendants, filed the suit for getting plot no.5 in his name from the Municipal Board, Nathdawara with a prayer that the agreement between defendant no.1 and no.2 for giving plot to defendant no.1 by defendant no.2 may be cancelled.

Defendant no.1 submitted written statement and admitted that he purchased plot no.1 from the Municipal Board, Nathdawara and he sold this plot to the plaintiff by registered sale-deed dated 9.12.1969. He also admitted that new scheme was framed and the plot no.1 referred above was included in the scheme for park and new plot no.5 was given in lieu of plot no.1 by the Municipal Board, Nathdawara in the name of defendant no.1. According to defendant no.1, the plaintiff was

knowing this fact and therefore, the plaintiff demanded the sale consideration of Rs.2500/- from defendant no.1. However, it is not the case of the defendant that in fact defendant paid or even offered consideration to the plaintiff. Despite all above admissions, the defendant pleaded that in view of the agreement between defendant no.1 and defendant no.2 for allotment of the plot in the name of defendant no.1 by defendant no.2, the plaintiff is not entitled for any relief.

Several issues were framed and both the parties led their evidence. One of the issue was that whether defendant no.1 handed over possession of the plot to the plaintiff at the time of sale or thereafter. The trial court held that at the time of sale or thereafter, the actual physical possession of the plot was not delivered to the plaintiff by the defendant. Another issue was that whether the plaintiff is entitled to plot no.5 ? Rest of the issue are not very much relevant for the purpose of deciding this appeal. The core question in this case is that whether defendant no.1 could have obtained the plot from the Municipal Board, Nathdawara in lieu of plot no.1 which is already sold to the plaintiff and whether the plaintiff is entitled to benefit of agreement which was executed between defendant no.1 and defendant no.2 as defendant no.1 was holding the possession of the plot no.1 in trust for plaintiff ? The trial court decreed the suit of the plaintiff on

17.3.1973.

The decree of the trial court dated 17.3.1973 was challenged by the defendant present appellant which was dismissed by the first appellate court. The first appellate court took note of the admission of both the parties that both the parties admitted that the sale has been affected in favour of defendant no.1 by the Municipal Board, Nathdawara of plot no.5 and that is only in lieu of plot no.1. The first appellate court rejected the defendant-appellant's defence that the plaintiff at the most can claim refund of money, interest and cost only but not the plot. According to defendant such is the position as per Section 56(6)(b) of the Transfer of Property Act, 1882. The first appellate court rejected plea of the frustration of the contract also and upheld the judgment and decree of the trial court by judgment and decree dated 4.8.1986. Hence this second appeal.

The appeal was admitted on 24.2.1987 by framing the following substantial question of law:-

> *"Whether the present case is covered by the provisions of Section 55 of the Transfer of Property Act or Section 70 and 73 of the Indian Contract Act and the plaintiff is entitled only to be repaid the sale price actually paid along with interest thereon?"*

According to the learned counsel for the defendant no.1-appellant, it is true that the plot was purchased by the appellant from

the Municipal Board, Nathdawara and it was sold to the plaintiff-respondent by registered sale-deed dated 9.12.1969. The possession of the plot was not delivered to the plaintiff. It is also submitted that in such situation, the plaintiff could have claimed at the most refund of the sale consideration and could have claimed the interest over it or any compensation. It is also submitted that defendant no.1 could have been asked to deliver possession of the plot no.1 only and in changed circumstances, the appellant defendant cannot give possession of the plot no.1 to the plaintiff, therefore, third clause of Section 56 of the Contract Act 1872 provides that in such situation the purchaser is entitled to claim refund of money and interest thereon. Same is the affect of Section 56(6)(b) of the Transfer of Property Act, 1882.

The learned counsel for the respondent-plaintiff vehemently submitted that none of the plea as raised by defendant no.1 in this appeal is available to the defendant-appellant. Even after the sale of the property if the property remained in the hands of the seller then he holds the property in trust only as provided under Section 94 of the Indian Trust Act,1882. It is also submitted that it is an admitted fact that the plot no.5 was given by the original vendor Municipal Board, Nathdwara to defendant no.1 in lieu of plot no.1 only and the plaintiff was legal owner of the plot no.1. The said transaction of allotment of plot no.5 in favour of defendant no.1 by the Municipal Board,

Nathdawara was due to the mistake of fact only as admittedly, at the time of the said transaction between defendant no.1 and defendant no.2, the plot no.1 was not belonging to and was not owned by defendant no.1 and this fact was not in the knowledge of defendant no.2, therefore, only the defendant no.2 gave the plot no.5 to defendant no.1. It is also submitted that with the sale of the immovable property, incidence of the ownership including right to surrender and take another property in lieu thereof also stands transferred to the vendee. Therefore, the plaintiff was entitled to enforce the decision of the Municipal Board, Nathdawara for getting plot transferred in his name and defendant no.1 himself has no right to take the plot from defendant no.2. It is also submitted that in case plot no.5 is given to defendant no.1 then consideration is plot no.1. Then defendant no.1 is not in position to transfer the title of plot no.1 in favour of Municipal Board, Nathdwara. Therefore, any transaction between defendant no.1 and defendant no.2 will be without consideration. It is also submitted that the defendant in fact has not took any defence to resist the suit as he admitted the sale of the plot to the plaintiff and both the defendants admitted that plot no.5 was given or was available to be given to the person who owned plot no.1.

I considered the submissions of the learned counsel for the parties.

At the out set, it may be observed that Section 55 of the Transfer of Property Act provides about rights and liabilities of buyer and seller. None of the provision specifically deals with the fact situation which is the fact situation of this case. However, sub-clause (b) of sub-section (6) of Section 55 of the Transfer of Property Act,1882, which is relied upon by the learned counsel for the appellant is as under:-

> "Section 55(6) The buyer is entitled-
>
> (a) ....
>
> (b) unless he has improperly declined to accept delivery of the property to a charge on the property, as against the seller and all persons claiming under him, * * * to the extent of the seller's interest in the property, for the amount of any purchase money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission."

The above provision provides that the buyer is entitled to charge to the extent of seller's interest in the property for the amount of any purchase money properly paid by the buyer in anticipation of the delivery of possession and for interest on such amount in case where the possession of the property has not been delivered by the vendor. The buyer is also entitled cost if he is found entitled for in a suit in case the

buyer had right to decline to accept the delivery of possession and he declined the possession for lawful reason. The right under Section 55(6) (b) of the Transfer of Property Act is the right of buyer and is not of seller. Same is the effect of third clause of Section 56 of the Contract Act. Third clause of Section 56 is as under:-

> **"Compensation for loss through non-performance of act known to be impossible or unlawful.-** Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

The provision is only to safeguard the interest of unaware buyer and nowhere given right to seller to act detrimental to interest of the purchaser in any manner and to take benefit out of his dishonest act and act which is against spirit of section 55(1)(d) and (e) of the Transfer of Property Act, 1882. This provision cannot be read to mean where purchaser is ready to take possession of the property, the seller can force buyer to take back the money paid by purchaser to seller along with interest and or cost. Therefore, I do not find any force in the plea taken by the appellant for the above reason.

In this case, if we look into the stand taken by defendant no.1 himself then the transaction was completed, the sale was affected and, therefore, title of plot no.1 stands transferred in the name of the plaintiff. The defendant seller was under obligation to deliver possession

of the plot to plaintiff buyer as required by Section 55(1)(f) of the Transfer of Property Act, 1882 and till possession is delivered to buyer, the seller was bound to take care of the property and all documents of title relating to such property as man of ordinary prudence as provided by Section 55(1)(e) of the Transfer of Property Act, 1882. The plaintiff in this case is claiming the natural benefits arising out of the property which he purchased lawfully from defendant no.1. Therefore, Section 55 (6)(b) of the Transfer of Property Act,1882 and Section 56 of the Contract Act, 1872 have wrongly been invoked by appellant-defendant in the present case and defendant was holding the possession of the plot only to deliver it to plaintiff and if he acted as prudent man by protecting and made efforts to get the another plot in lieu of plot no.1 from defendant no.2, which otherwise would have been done by the plaintiff himself, the defendant no.1 did all for the benefit of purchaser. Even if intention of defendant seller was not for the benefit of purchaser even then the purchaser is entitled for the benefits which is the benefit attached with the ownership and not with mere possession.

So far as Sections 70 and 73 of the Indian Contract Act are concerned, Section 70 of the Act of 1872 is as under:-

> **"Obligation of person enjoying benefit of non-gratuitous act.-** Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the

> benefit thereof, the latter is bound to make compensation to the former in respect of , or to restore, the thing so done or delivered."

A bare reading of said section clearly shows that no plea on the basis of Section 70 is relevant in the facts and circumstances of the present case. It is not a case where defendant no.1 lawfully did the thing(sold the plot) and did not deliver the possession, intending not to do so gratuitously.

Section 73 of the Contract Act provides for awarding compensation for loss or damages caused by breach of contract. Present is not the case of any of the parties that the defendant breached the contract. The transaction of sale is completed act is an admitted fact by both the parties, therefore, any question on the basis of Section 73 also does not arise in this appeal.

There is force in the submission of the learned counsel for the respondent that defendant no.1 was holding the property in trust after sale of the property to the plaintiff and he was bound to give all benefits of that property to the plaintiff as provided by Section 94 of the Indian Trust Act (Sec. 94 repealed w.e.f. 19.5.1988). The defendant pleaded that even the plaintiff demanded refund of the sale consideration but admittedly the sale consideration was neither offered nor paid by the defendant to the plaintiff nor any deed of re-conveyance was executed in favour of the defendant. Therefore, the

Municipal Board, Nathdawara if decided to allot plot no.5 in lieu of plot no.1, then that certainly means only to allot plot to the owner of plot no.1 and not to the plaintiff.

In view of the above, I do not find any merit in this appeal and the same is hereby dismissed.

(PRAKASH TATIA),J.

mlt.